

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

**Federal-State Joint Board on
Universal Service**

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CC Docket No. 96-45

To: Wireline Competition Bureau

Petition for Waiver – Expedited Action Requested

Smith Bagley, Inc. (“SBI”), by counsel and pursuant to Section 1.3 of the Commission’s rules, 47 C.F.R. Section 1.3, hereby requests a waiver of Section 54.400(e) of the Commission’s rules, 47 C.F.R. Section 54.400(e). For the reasons set forth below, SBI requests that the Commission make Tier 4 Lifeline and Link-up benefits available to residents of non-tribal lands located within the Navajo Reservation in the state of Utah. A map depicting the Navajo Reservation in Utah and the non-tribal lands within the reservation is attached hereto as Exhibit A.

I. Introductory Statement.

SBI is licensed by the Commission to provide cellular and personal communications service (“PCS”) throughout portions of Arizona, New Mexico, and Utah. Its FCC-licensed service territory includes the entirety of the Navajo Reservation, which is spread over portions of those states. As of this writing, SBI has been designated as an eligible telecommunications carrier (“ETC”) throughout the entirety of the Navajo Reservation in Arizona and New Mexico.

Currently, SBI has a petition pending before this Commission seeking designation as an ETC in that portion of the Navajo Reservation located in Utah.¹

In areas where it has been designated as an ETC, SBI has constructed wireless telecommunications infrastructure to reach out to consumers on reservations who suffer from some of the lowest household telephone penetration levels in this country. To carry out its universal service mandate, SBI launched its “VisionOne™” service offering in June 2001. VisionOne™ permits qualifying subscribers living on reservation lands to pay \$1.00 per month for service, including 300 minutes of airtime. The company also provides toll- and airtime-free calling to a long list of government agencies and community services. A critical factor in SBI’s success in rolling out VisionOne™ has been the availability of Tier 4 support under the Commission’s Lifeline and Link-up rules.

SBI’s pending petition for ETC status in Utah seeks to bring these same benefits, including Tier 4 discounts, to residents of the Navajo Reservation in that state. However, there are very small areas within the reservation that are private, non-tribal lands. Navajo Trust lands comprise 1911 square miles in Utah. The non-tribal lands at issue here represent less than 16 square miles, or eight-tenths of one percent (0.8%) of the area designated as Navajo Trust land. There are 28 households, comprising 109 people on the non-tribal lands at issue.²

Under Section 54.400(e) of the Commission’s rules, Tier 4 discounts are available to qualifying low-income consumers “living on or near a reservation.” Currently, otherwise eligible residents in non-tribal lands within the Navajo Reservation in Utah cannot obtain Tier 4 benefits through the “near reservation” program because the FCC’s definition of “Near

¹ Smith Bagley, Inc., Petition for Designation as an Eligible Telecommunications Carrier for the Navajo Reservation in Utah, CC Docket No. 96-45 (filed May 24, 2002).

² Source: ONLA Lands Dept., Div. of Natural Resources.

Reservation” contained in Section 54.400(e) of the rules has been stayed for nearly six years.³

The FCC has an ongoing proceeding to consider appropriate methods for targeting Lifeline and Link-up support to non-tribal areas that are adjacent to reservations.⁴ Accordingly, SBI requests that the Commission waive Section 54.400(e) of its rules and declare that Tier 4 Lifeline and Link-up support is available to qualifying consumers residing on non-tribal lands located within the Navajo Reservation in the state of Utah.

On March 30, 2005, the FCC granted SBI’s request for a waiver similar to that requested herein.⁵ That order enabled qualifying consumers in the Eastern Navajo Agency – a significant portion of which lies outside of reservation lands – to benefit from the additional discounts available under the FCC’s Tier 4 rules. As with the Eastern Navajo Agency in New Mexico, the private lands within the Navajo Reservation in Utah have “the same impediments to subscribership and infrastructure development as those existing on Tribal lands.”⁶ As in that case, a waiver will allow SBI to offer service to consumers in these areas at steeply discounted prices that would not be possible without the availability of Tier 4 discounts.⁷

Because of the unique and extraordinary circumstances facing consumers these areas, as described below, a waiver of Section 54.400(e), declaring that Tier 4 benefits will be available to residents throughout the non-tribal lands within the Navajo Reservation, is warranted to provide

³ *Federal-State Joint Board on Universal Service, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 12,208 (2000) (“*Twelfth Report & Order*”); *stayed in part, Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 17,112 (2000).

⁴ *Federal-State Joint Board on Universal Service, Twenty-Fifth Order On Reconsideration, Report And Order, Order, And Further Notice Of Proposed Rulemaking*, 18 FCC Rcd 10958 (2003) at Appendix B.

⁵ *Smith Bagley, Inc., Petition for Waiver of Section 54.400(e) of the Commission’s Rules, Memorandum Opinion and Order*, 20 FCC Rcd 7701 (2005) (“*Eastern Agency Waiver Order*”).

⁶ *Id.* at 7705.

⁷ *Id.* at 7706-07.

all carriers serving those areas an incentive to reach out to those consumers. In support of this request, the following is respectfully shown.

II. Waiver Standard.

The Commission has authority to waive its rules if there is “good cause” to do so. 47 C.F.R. Section 1.3. The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. *WAIT Radio v. FCC*, 418 F. 2d 1153, 1159 (D.C. Cir. 1969) ("*WAIT Radio*"). As further explained in *WAIT Radio*, the Commission is charged with administration of its responsibilities consistent with the “public interest.”

That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the “public interest” for a broad range of situations, does not relieve it of an obligation to seek out the “public interest” in particular, individualized cases. In fact, the Commission’s right to waive its rules is not unlike an obligation in that it is a *sine quo non* to its ability to promulgate otherwise rigid rules. It is the necessary “safety valve” that makes the system work. *See WAIT Radio* at 1157, 1159.

III. A Waiver of Section 54.400(e) is Needed to Bring Vital Basic Telecommunications Service to the Non-Tribal Lands Within the Navajo Reservation in Utah.

Under Section 54.400(e), Tier 4 Lifeline and Link-up benefits are available to eligible residents of Tribal Lands, which is defined as follows:

(e) *Eligible resident of Tribal lands.* An “eligible resident of Tribal lands” is a “qualifying low-income consumer,” as defined in paragraph (a) of this section, living on or near a reservation. A “reservation” is defined as any federally recognized Indian tribe’s reservation, pueblo, or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments. “Near reservation” is defined as those areas or communities adjacent or contiguous

to reservations which are designated by the Department of Interior's Commission of Indian Affairs upon recommendation of the local Bureau of Indian Affairs Superintendent, which recommendation shall be based upon consultation with the tribal governing body of those reservations, as locales appropriate for the extension of financial assistance and/or social services, on the basis of such general criteria as: Number of Indian people native to the reservation residing in the area; a written designation by the tribal governing body that members of their tribe and family members who are Indian residing in the area, are socially, culturally and economically affiliated with their tribe and reservation; geographical proximity of the area to the reservation, and administrative feasibility of providing an adequate level of services to the area.

NOTE TO PARAGRAPH (e): The Commission stayed implementation of paragraph (e) as applied to qualifying low-income consumers living "near reservations" on August 31, 2000 (15 FCC Rcd 17112).

As the note advises, the Commission has stayed eligibility in "near reservation" lands pending further action to redefine the term "near reservation." That stay has been in place for nearly six years now and as a result, consumers in non-tribal lands within the Navajo Reservation in Utah do not have access to Tier 4 benefits from any carrier, including rural incumbent local exchange carriers.

Today, the situation in those areas is largely as it was decades ago, except the population there has continued to grow. According to available data, there are 28 households comprising 109 persons living on non-tribal lands inside the reservation boundaries in Utah.⁸ Although we have no additional information as to whether the demographic composition of these 109 persons mirrors those within the Navajo Reservation, this fact is not relevant here. Any person otherwise qualified to receive Lifeline and Link-up benefits on tribal lands who would qualify for Tier 4

⁸ Source: U.S. Census 2000.

Lifeline and Link up benefits should receive them, primarily because of the lack of choices in telecommunications services that SBI knows to exist on Navajo lands in Utah.

We will not burden the record repeating the litany extreme poverty and poor demographic characteristics on Navajo lands, as set forth in SBI's previous filings in this docket. Suffice it to say that there are significant areas on Navajo lands in Utah where no telephone service is available and most citizens, including those living on non-tribal lands, do not have a choice of telephone service. No telephone company is eligible to extend Tier 4 benefits to residents in these areas and as a result no significant telephone penetration gains have been recorded since the Commission adopted the Tier 4 support program in 2000.

In the nearly five years that it has been an ETC, SBI has added nearly 50,000 new Tier 4-eligible subscribers on Native American lands in Arizona and New Mexico. Household telephone penetration on Navajo tribal lands in Arizona and New Mexico has significantly increased as a result of all ETCs having the ability to offer and advertise Tier 4 benefits. These facts support a finding that otherwise eligible persons living on non-tribal lands within the reservation in Utah will benefit through the provision of Tier 4 benefits.

It is worth repeating what is already in the record, that the Navajo Reservation in Utah currently ranks at the bottom, or very close to the bottom, of any geographic area in the United States in terms of household telephone penetration. As SBI understands it, there are no other telephone companies serving only the private lands and offering choices to the 109 consumers at issue here. As such, the Commission can conclude that it is not feasible for other carriers to deliver to citizens on non-tribal lands an alternative to the Lifeline and Link up benefits that may be available from the ILEC authorized to serve the area.

SBI's experience on Navajo lands in Arizona is instructive here. There were many areas on the Navajo Reservation in Arizona where rural ILECs had not extended wireline telephone plant – and to this day have no apparent intention of doing so. Consumers who desired telephone service simply could not get it. The sparse population and distances between existing plant and requesting customers made extending facilities challenging. The socio-economic conditions of potential subscribers made it impossible for rural ILECs to justify investing because there was no reasonable likelihood that their investment would be recovered.

When the Arizona and New Mexico commissions designated SBI as an ETC on Navajo lands in Arizona and on reservation lands and in the Eastern Navajo Agency in New Mexico, these grants opened the door to a more efficient technology to deliver infrastructure that could reach subscribers. When the FCC ruled that residents of tribal lands would receive Tier 4 benefits, it made possible, for the first time, a price point that enabled consumers with less than \$5,000 of per capita income to afford basic telephone service.

The results have been dramatic. SBI has rapidly constructed facilities to reach these communities in both Arizona and New Mexico. Its outreach efforts have resulted in significant and likely permanent improvement in telephone penetration rates. Upon a grant of ETC status in Utah, SBI plans to bring the same benefits to residents of the Navajo Reservation. There is absolutely no reason why these same results cannot be achieved in the non-tribal lands inside the reservation's boundaries. The conditions are similar. The geography is similar. Low-income consumers there suffer from the same challenges as their neighbors on tribal lands.

In its pending petition for ETC status in Utah, which covers the non-tribal lands within the borders of the Navajo Reservation, SBI has proposed to construct six new cell sites on the reservation following its designation, many or most of which, absent a grant of ETC status,

would not be constructed any time soon, if ever. These sites will begin the same process it has been undertaking in Arizona and New Mexico – extending vital wireless infrastructure to remote tribal areas. The availability of Tier 4 discounts to consumers in the non-tribal lands within the reservation in Utah will enhance SBI’s ability to bring affordable service to eligible residents. Additionally, rural ILECs that serve those areas may immediately offer Tier 4 discounts to qualifying consumers in these areas. Any ETC may participate to improve the situation in these areas.

In light of these facts, SBI respectfully suggests that a waiver of Section 54.400(e) to permit carriers to offer Tier 4 benefits in the non-tribal lands within the Navajo Reservation in Utah is appropriate. The Commission can easily find, based on the information provided herein, that many of the factors that are the primary impediments to subscribership on tribal lands are present on the non-tribal lands within the Navajo Reservation in Utah, and that consumers in those areas will therefore benefit from the availability of the additional discounts available under Tier 4.⁹

IV. Request for Relief.

SBI requests the following relief:

1. Waive Section 54.400(e) insofar as the current stay of the “near reservation” provision renders otherwise eligible residents of non-tribal areas ineligible for Tier 4 Lifeline and Link-up support;
2. Grant of the waiver would permit the FCC to define, in this unique circumstance, each otherwise eligible resident of the non-tribal lands inside the boundaries of the Navajo Reservation in Utah as an “eligible resident of Tribal lands.”

⁹ See *Eastern Agency Waiver Order*, 20 FCC Rcd at 7701.

V. Request for Expedited Action and Conclusion.

There is good cause for the Commission to waive Section 54.400(e) to permit all carriers to offer Tier 4 Lifeline and Link-up benefits to eligible consumers on the non-tribal lands inside the boundaries of the Navajo Reservation in Utah. While residents of Navajo lands in Arizona and New Mexico have seen dramatic improvements over the past two years, the lack of access to affordable, high-quality telecommunications service on the Utah portion of the reservation, as well as the non-tribal lands inside the reservation's boundaries, remains intolerable. This waiver is vital to providing vital health and safety benefits to a population that deserved these benefits years ago. Accordingly, SBI requests that this waiver request be given expedited treatment so that Tier 4 discounts can be made available as quickly as possible following a grant of ETC status on the Navajo Reservation in Utah.

There is an ample record upon which to conclude that an expedited grant of this petition is necessary to resolve serious and unique problems that must not be left for resolution through the ordinary administrative process. Section 1.3 was designed precisely for this situation – one in which immediate action is necessary to assist consumers who are denied critical benefits by a strict reading of the Commission's rules. The vital health and safety benefits that are today unavailable on the non-tribal lands within the Navajo Reservation in Utah provide good cause to act on an expedited basis.

Respectfully submitted,

Smith Bagley, Inc.



By: _____

David LaFuria
Steven Chernoff
Its Counsel

Lukas Nace Gutierrez & Sachs, Chartered
1650 Tysons Boulevard
Suite 1500
McLean, VA 22102

dlafuria@fcclaw.com

March 1, 2006

Utah – Navajo Lands

- Reservation Trust Land
- Indian Allotment Land
- Private Land

